U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042.
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

B5

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 22 2005
WAC 04 183 53852

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a software consultancy business. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner is not the beneficiary's employer and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 204(a)(1)(F) provides:

> Any employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(2) . . . may file a petition with the Attorney General for such classification.

The regulation at 8 C.F.R. § 204.5(c) reiterates this information. For ascertaining whether or not the petitioner is the beneficiary's "actual employer," the regulation at 20 C.F.R. § 656.3, specifically relating to *immigrant* petitions, provides:

> "Employment" means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.
>
> "Employer" means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

The director also cited the definition of employer at 8 C.F.R. § 214.2(h)(4)(ii). This regulation, however, only applies to *nonimmigrant* petitions. The matter before us involves an immigrant petition. The director then cited the rule for determining an employment relationship set forth in American Jurisprudence. Where a term is defined in the relevant law or regulation, however, citing to an outside definition is not typically useful in interpreting the statute or regulation.

Initially, the petitioner submitted its tax returns for 2001, 2002 and 2003 and evidence of the beneficiary's education and experience. In support of the beneficiary's Application to Register Permanent Residence or Adjust Status, Form I-485, the beneficiary submitted his Forms W-2 for 2001, 2002 and 2003, all issued by the petitioner. On March 23, 2005, the director requested clarification as to whether the beneficiary would be working in-house or contracted out. In response, the petitioner submitted a letter from its president asserting

that the beneficiary has been working for the petitioner since May 23, 2001, handling both in-house and outsourced projects. The petitioner indicates that the beneficiary is currently reporting to the petitioner's client MDB & Associates. The petitioner further submits its contract with MDB & Associates and project descriptions from that company. While the project descriptions list the "client" as Symantec Corporation, they do not necessarily imply that the beneficiary was re-outsourced. Rather, it appears that the beneficiary was outsourced to MDB & Associates to work on a project for one of that company's clients.

The director concluded that the petitioner was not the beneficiary's employer. The director questioned whether the petitioner required any software services in-house or was responsible for paying the beneficiary's wages full-time, even when not contracted to MDB & Associates. The director also expressed concern that MDB & Associates was re-outsourcing the beneficiary. On appeal, counsel notes that the petitioner has been paying the beneficiary and that the beneficiary also works on in-house projects for the petitioner. The petitioner submits the beneficiary's Forms W-2 and a selection of his pay stubs, all issued by the petitioner. In a new letter, the petitioner's president asserts that should the contract with MDB & Associates end, the beneficiary would work on an in-house project. The petitioner submits evidence of its in-house project, Ibackup, and evidence that it contracts with other companies as well. Finally, the petitioner submits its 2004 tax returns.

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), the district director determined that since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary. *Id.* at 773. Additionally, *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), held that the petitioning firm was the beneficiary's actual employer because it was not an employment agency merely acting as a broker in arranging employment between an employer and job seeker, but retained its employees for multiple outsourcing projects. *Id.* at 286. *See also Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982); *Sussex Engg. Ltd. V. Montgomery,* 825 F.2d 1084 (6th Cir. 1987), *cert denied,* 485 U.S. 1008 (1988). We acknowledge that these cases relate to nonimmigrants. Unlike the regulation quoted by the director, however, which unambiguously relates only to nonimmigrant petitions, there is nothing about the analysis in these precedent decisions to suggest that they apply only to nonimmigrant cases.

It is clear from the Forms W-2 that the petitioner has continuously employed the beneficiary since 2001, paying over the proffered wage in 2003 and 2004. We are persuaded that the petitioner intends to continue this employment relationship. While the petitioner outsources out the beneficiary's services, we are persuaded that the petitioner remains the beneficiary's employer, paying his wages and benefits and utilizing his services for in-house projects as well.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.